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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals in the present case (R. 80-98) is reported in 31 B. T. A. 1192. The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, reversing the Board of Tax Appeals (R. 107) is reported in 83 Fed. (2) 655.

Jurisdiction.

Judgment of the United States Circuit Court of Appeals was rendered on the 11th of April, 1936 (R. 107-121). A petition for rehearing duly filed was denied on May 27, 1936 (R. 122). Petition for certiorari was filed in this court July 31, 1936, and that petition was allowed on October 12, 1936.

Jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925.

Statutes Involved.

This case involves individual income taxes for the tax years 1924, 1925, 1926 and 1929. So far as the question here presented is concerned there is no material difference between the statutes in force during the respective years, and therefore the pertinent provisions of but one of them, the 1924 statute, are set forth in the appendix attached hereto.

STATEMENT.

The question presented is whether a life beneficiary of a trust estate who has made valid assignments of portions of his interest, must pay an income tax on the trust income which has thereafter been paid, not to him, but to the assignees in accordance with the terms of the assignments.

The facts were stipulated (R. 28) and as so stipulated were included in the findings of fact entered by the Board of Tax Appeals (R. 80). We here summarize them:

William Blair, father of the petitioner, died in 1899, a resident of Cook County, Illinois, (R. 28), leaving a last will whereby he devised his residuary estate in trust for the benefit of his wife and his son, Edward T. Blair (R. 36). Edward T. Blair was also named as one of the trustees. During the life of Mrs. Blair, the wife and son were each to be paid one-half of the income (R. 33, 36, 38). Upon the death of the wife the entire income was to be paid to Edward T. Blair during his life.

Upon the death of the survivor, subject to limitations not here important, the principal of the trust was to pass to Edward T. Blair's children (R. 38).

The wife and mother, Mrs. William Blair, died in March, 1923, and Edward T. Blair became the sole beneficiary and entitled to all the income (R. 28). Immediately he assigned to his children a large proportion of the additional beneficial interest which had come to him upon his mother's death. The first of the assignments here in question was made to his daughter, Lucy Blair Linn (Ex. 2, R. 43). Other similar assignments to other of his children were made at the same time and at subsequent dates (Exs. 3 to 13, R. 44 to 53). The assignments were all in writing, signed both by Mr. Blair and his children respectively.

They were all substantially identical in form. The important parts of the first were as follows:

> "This Indenture Made * * * this 2nd day of April, A. D. 1923, by and between Edward T. Blair, party of the first part, and Lucy Blair Linn, party of the second part, WITNESSETH:
>
> That the said party of the first part, in consideration of love and affection and One Dollar ($1), * * * does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Six Thousand Dollars ($6,000) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000) in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago. * * *
>
> EDWARD T. BLAIR (SEAL)
> LUCY BLAIR LINN (SEAL)"

The assignments were absolute and irrevocable.

The assignees, the children, were all residents of the State of Illinois, were all adults, and were the same persons who would be entitled to the principal of the trust, upon the death of their father, the assignor, (R. 38).

No contention has been advanced that in fact these assignments were made to meet any obligation of Mr. Blair toward his children, such as was the purpose of the assignment and trusts respectively in the cases of *Helvering* v. *Coxey,* 297 U. S. 694, *Helvering* v. *Schweitzer,* 296 U. S. 551; *Helvering* v. *Stokes,* 296 U. S. 551, and *Douglas* v. *Willcuts,* 296 U. S. 1.

The assignments were accepted by the trustees as valid, and the income so assigned was in fact paid to the assignees respectively, who in turn duly reported such income in their respective income tax returns and paid the tax thereon (R. 30).

The property right questions whether or not Edward T. Blair had an assignable interest in the trust estate, whether

or not he had assigned that interest in part by valid assignments to his children, were adjudicated by the courts of Illinois having jurisdiction over the trust estate, the trustees, the beneficiaries and the assignees. The litigation in which those property rights were adjudicated developed and terminated as follows:

The question as to the taxability of the income paid out by the trustees to the assignees by virtue of the assignments spoken of, first arose for the tax year 1923, not here involved.

The Commissioner held that the assignments, being merely of a life interest in the income of a trust, did not transfer a present interest in property or property rights, but constituted merely an assignment of future income if and as earned; therefore the income was to be regarded as belonging to the taxpayer, Edward T. Blair, and not the assignees, and accordingly was taxable to him.

Edward T. Blair appealed this question to the Board of Tax Appeals, which held that the assignments constituted transfers of a present property interest and that the income thereby produced was not taxable to him (18 B. T. A. 69).

The then Commissioner appealed that decision to the Circuit Court of Appeals, for the Seventh Circuit. There the principal question discussed was as to the *validity* of the assignments. The contention of the Commissioner was that the trust being spendthrift in nature, the life beneficiary, Edward T. Blair, did not have the power to make a valid assignment. This contention both Edward T. Blair and the Commissioner agreed, and the Circuit Court of Appeals held, basically involved the beneficiaries' and assignees' property rights which were to be determined by the law of the State of Illinois. At that time there had not been any determination of those property rights by any Illinois court, and there was no Illinois authority squarely

in point on the question. Hence the Circuit Court of Appeals itself interpreted the related decisions of the Supreme and Appellate Courts of Illinois, and held that under those decisions as so interpreted, the particular language of the will of William Blair established a spendthrift trust and deprived Edward T. Blair of any power to make a valid assignment. Hence the court decided that the assignments were invalid, and that therefore the income was taxable to Edward T. Blair (60 Fed. (2) 340).

The petition to this court for writ of certiorari having been denied (288 U. S. 602) the validity of the tax for the year 1923 was settled and the tax was paid.

However, the assignees not having been parties to that litigation were in no way bound by the judgment of the Circuit Court of Appeals. Neither were the trustees. As to both assignees and trustees it was still an open question whether under the laws of Illinois the assignments were valid or invalid. Thus the trustees were left in a position of grave doubt whether to pay the income to Edward T. Blair or to the assignees.

Accordingly the trustees, in order to secure a judgment binding on all parties on this important question, through their own independent counsel, Messrs. Cutting, Moore & Sidley, filed in the Superior Court of Cook County, Illinois, a bill in chancery asking for a construction of the provisions of the will creating the trust, and for a specific determination of the question whether the assignments were valid under the law of Illinois (R. 54-62, particularly paragraphs 12 (R. 58) and 12(d) (R. 60) of the bill).

In this bill the entire matter was laid before the Superior Court of Cook County, Illinois, including the question as it had been presented in the Circuit Court of Appeals, the judgment of that court that the assignments were invalid, and the court's opinion in that connection.

The bill particularly made reference to the opinion of the Circuit Court of Appeals and listed the authorities relied upon by the court in giving its opinion (R. 59-61).

The bill pointed out the dilemma of the trustees, namely, that they did not know whether to regard the assignments as invalid, and pay the income to Edward T. Blair, or to regard them as valid and pay the income to the assignees; and that in the face of this dilemma the trustees needed to have an authoritative judgment (Par. 12 (h), 13, etc. of the bill, R. 60, 61, 62).

Edward T. Blair, the beneficiary, the taxpayer here, filed no answer to the bill of complaint. The assignees, however, through their counsel, Wilson & McIlvaine, duly filed their answers asserting the validity of said assignments (R. 63, 66).

On the hearing which followed the Superior Court decreed that under the law of Illinois the assignments were beyond the power of Edward T. Blair to make, and were therefore invalid (R. 63-65).

The assignees appealed to the Appellate Court of Illinois, where the matter was fully presented by briefs filed and oral arguments by both sides. The position of the trustees was that the decree should be affirmed, relying particularly upon the same Illinois authorities upon which the Circuit Court of Appeals in *Commissioner* v. *Blair,* 60 Fed. (2) 340, had relied. They also relied upon the opinion of the Circuit Court of Appeals in interpreting those authorities. (See Findings of Fact, R. 87).

The Appellate Court of Illinois in a written opinion, one of the three judges dissenting, thoroughly reviewed all of the Illinois decisions on the subject, and particularly discussed and considered with all due deference the decision of the Circuit Court of Appeals in *Commissioner* v. *Blair,*

60 Fed. (2) 340, already referred to. The Appellate Court decision pointed out that the assignments were to the same persons who in all probability would receive the trust property on the event of the death of the life beneficiary, and that the effect of the assignments was merely to accelerate the gifts of the grandfather, the testator, to his grandchildren; that had the decedent intended to restrict a *voluntary* alienation by his son he could readily have accomplished it by the use of a very few words; that the absence in the will of any positive expression of a restraint on the voluntary alienation of Edward T. Blair's interest, that interest was assignable; that under the provisions of the will when construed in accordance with the law of Illinois, there was no such expression of a restraint on an assignment or voluntary alienation of that interest; that therefore the assignments were effective and valid. Accordingly it reversed and remanded the case to the Superior Court, with directions to enter a decree consistent with the opinion (R. 67; also 274 Ill. App. 23).

The Superior Court, complying with the mandate, duly entered its decree in which it found that Edward T. Blair by the instruments in writing in question assigned to his children parts of his life interest in the trust estate (R. 77, Par. 5); that the will of William Blair when properly construed did not constitute a restraint on the right of Edward T. Blair to voluntarily assign his interest, or any part thereof; that the said assignments were voluntary assignments of a part of the interest of Edward T. Blair in the trust estate and were valid; and accordingly the court decreed that the will of William Blair, when properly construed, was not a restraint on the right of Edward T. Blair to voluntarily assign his interest in said trust estate, or any part thereof, and that the assignments in question were valid (R. 78, 79).

At the time of the entry of this decree the cases involv-

ing the tax years here in question were pending before the Board of Tax Appeals and had been consolidated. And at the hearing of that consolidated case the entire record of the Illinois case was introduced in evidence, including the bill of complaint, answers, decree, opinion of the Appellate Court of Illinois, and final decree of the Superior Court. (R. 54-79.)

Thereupon the Board of Tax Appeals entered its findings of fact and opinion (R. 80) holding that the decree of the Illinois court constituted the law governing the property rights of the parties, and that the income tax question was to be determined in view of that adjudication (citing *Freuler* v. *Helvering*, 291 U. S. 35); that the assignments therefore were valid; that they constituted transfers of a present property interest in the trust estate; and that therefore the income payable and in fact paid to the assignees on account of the assigned interest was not to be taxed to the assignor, Edward T. Blair (R. 90) 31 B. T. A. 1192.

The Commissioner on his appeal to the Circuit Court of Appeals for the Seventh Circuit, maintained that the nature of the taxpayer's interest was not that of a present property right, capable of being assigned *in praesenti*, that to avoid the tax the assignor's interest must be an interest in the corpus of the trust, or in the property from which the income accrued, and that not having such an interest the assignments did not divest the assignor of the tax liability on the income assigned. (R. 113.) And the court in sustaining the Commission in this contention and reversing the Board of Tax Appeals held that while the decree of the Superior Court of Cook County, Illinois, was a binding adjudication of the property rights of the parties, the assignments as transfers of a life interest in the income of a trust were not transfers of present interests in property, but merely transfers of a future right to in-

come; and that therefore that income was taxable to Edward T. Blair (Sup. Rec. 107, 120, 121) 83 Fed. (2) 655.

It is this decision of the Circuit Court of Appeals that the petitioner asks be reversed.

Specification of Errors to Be Urged.

The Court below erred.

1. In reversing the decision of the United States Board of Tax Appeals.

2. In holding that the income in question paid from the trust estate created under the will of William Blair to the assignees named in the assignments in question was the income of the taxpayer, and therefore taxable to him.

3. In holding that Edward T. Blair did not have an interest in the trust estate created by the will of William Blair that could be transferred by him free of income tax.

SUMMARY OF THE ARGUMENT.

The interest of Edward T. Blair under his father's will was an equitable life estate in the entire corpus of the residuary trust estate.

His life estate was property. It was assignable in whole or in part.

It was in part assigned by valid assignments.

The decree of the Illinois court having jurisdiction over the subject matter and the parties, adjudicated the assignability of the interest and the validity of the assignments.

The assignments conveyed to the assignees the entire interest of the life beneficiary in the trust to the extent of the portion assigned, and divested the assignor of that interest. It was no longer his property.

Prior to the assignments the life beneficiary was the owner of the life estate, and solely because of that fact entitled to the income from it and obligated to pay the tax upon that income.

After the assignments, the assignees became substituted beneficiaries of the trust, substituted owners of the interest assigned and the income therefrom.

And just as prior to the assignments the interest of the life beneficiary carried the burden of paying the income tax, so subsequent to the assignments of that interest the tax burden passed to the assignees.

The contention advanced as an answer by the Commissioner and affirmed by the Circuit Court of Appeals is that the interest assigned was not a present property interest. But even if such a test be regarded as correct, the contention itself is wrong. For it is true as a matter of substan-

tive law that the interest of a life beneficiary in a trust estate *is a present property interest.*

Such an interest is not a mere right to receive income in the future, a mere chose in action, but is a present property right absolutely owned by the life beneficiary and assignable by him.

To effect such an assignment it is not necessary to transfer the corpus of the trust estate. An assignment of the equitable interest carries with it all that the assignor has, all that he was taxable upon prior to the assignment.

ARGUMENT.

I.

THE VALIDITY OF THE ASSIGNMENTS BY EDWARD T. BLAIR OF PORTIONS OF HIS INTEREST AS A LIFE BENEFICIARY IN THE TRUST ESTATE.

By final decree of the Superior Court of Cook County, Illinois, in the cause in which the property rights of Edward T. Blair, the original beneficiary and his assignees were properly in issue, the assignments in question were held valid. Thus there was an adjudication that the assignees were respectively the owners of the property rights in such part of the interest in the trust estate as was assigned, and that the assignor was no longer the owner.

The Commissioner has all along contended, and the taxpayer has all along agreed, that the fundamental question as to the property rights in the interest in question involving as it does a question of property rights, depends for its answer on the law of the State of Illinois. (*Blair* v. *Commissioner*, 18 B. T. A. 69; 60 Fed. (2) 340.)

Decisions of this court render any other position untenable.

Freuler v. *Helvering*, 291 U. S. 35.
Spindle, Assignee v. *Shreve*, 111 U. S. 542.
Uterhart v. *U. S.*, 240 U. S. 598.
Poe v. *Seaborn*, 282 U. S. 101.

In the case first mentioned it appears that in a controversy between the Commissioner and several life beneficiaries of a trust estate, the beneficiaries contended that they were entitled to deduct from their income an amount properly representing depreciation on the trust property.

The trust was located in California, and it was therefore admitted that the law of California would govern the rights of the beneficiaries in that regard. There being no decision at that time specifically covering the point, the Circuit Court of Appeals for the Ninth Circuit construed the law of California to the effect that the trustee was not entitled to make any such deductions from the income payable to the life beneficiaries. Accordingly, with reference to the particular tax years involved in that litigation the beneficiaries were not allowed to make the deduction, and were taxed accordingly. Subsequently the trustees filed appropriate proceedings in the California State courts to settle their accounts, and asked particularly for a construction of the will under the California law with reference to the question whether or not deductions should be made from income on account of depreciation. The California court held that under the California law such deductions were proper and that the trustees should exact from the beneficiaries a return of the amounts that had not been withheld in the past. There was no appeal from this decision. Neither the Commissioner nor the Government were parties to it. Thereafter in the cases pending before the Board of Tax Appeals between the same taxpayers and the Commissioner for subsequent years, the decree of the California court was introduced in evidence. And when the case came to this court it was held that that decree was the law of the case, and was conclusive upon the Commissioner and the courts in the tax case. And that the fact that the decree came long after the tax questions arose had no bearing on the conclusion. In this connection this court said, at page 44:

> "We understand the respondent to concede the binding force of a state statute, or a settled rule of property, followed by state courts, and as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the state court does in fact govern the dis-

tribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the state court was the order governing the distribution within the meaning of the act.

Moreover, *the decision of that court,* until reversed or overruled, *establishes the law of California respecting distribution of the trust estate.* It is none the less a declaration of the law of the state because not based on a statute, or earlier decisions. *The rights of the beneficiaries are property rights and the court has adjudicated them.* What the law has *announced by that court adjudges distributable is, we think, to be so* considered in applying section 219 of the Revenue Act of 1921." (Italics ours.)

The court then discusses the question whether the California procedure was a collusive one and holds it was not.

To the same effect is *Hubbell* v. *Helvering,* 70 Fed. (2) 668.

But despite the fact that the Circuit Court of Appeals recognized the doctrine above set forth and stated frankly that it was bound by the decision of the Illinois State courts, it expresses some doubts and in the closing paragraph of its opinion comments in such a way as to prompt the question whether the court in fact gave the decree its full effect. We particularly refer to the following clause: "The income was not even subject to his (Mr. Edward T. Blair's) disposition until he received it. • • • While he could authorize the trustees to deliver anything that was due to him, it was not deliverable until it was *his to dispose of.*" (R. 121.) (83 Fed. (2) 662.)

For certainly that statement is directly in conflict with the decree finding that the assignments in question were of a part of Edward T. Blair's interest in the trust estate (R. 77, Par. 5); that in the trust when properly construed there was no restraint on the right of Edward T. Blair "to voluntarily assign his interest in said trust estate, or

any part thereof" (Par. First); that the assignments were "voluntary assignments of part of the interest of Edward Tyler Blair in said trust estate"; and that they "are valid." (Par. Twelfth.) (R. 78, 79.)

The assignments being valid, it is clear that the property interest of the beneficiary in the trust was thereby effectively assigned to the extent of the proportion named in each. And to the extent of the assignments, the assignees became the *substituted beneficiaries* of the trust. To the same extent Edward Tyler Blair, the assignor, ceased to be the beneficiary of the trust.

Hence the trustees were obligated to recognize that shift in the property interest and to pay the income in connection therewith to the assignees. Such interest was no longer the property of the assignor, nor was the income, but both were the property of the assignees.

II.

The Interest Assigned Was a Present Existing Property Interest in the Trust and Carried With It the Income.

The assignments being valid the next question is as to what interest was thereby assigned.

The Commissioner, invoking a high technical standard of title, maintains that the interest owned by Mr. Blair and assigned by him was not a *present property right*, capable of being assigned *in praesenti* but merely a right to *future income*, and that therefore the assignment did not divest him of the tax liability upon the income.

The Circuit Court of Appeals in order to impose the tax on the original beneficiary found it necessary to hold that the interest of Mr. Blair was not in any way attached to the corpus of the estate, but was merely a right to future income. The court's answer to the simple fact above suggested, and its judgment in that regard, bears with such importance on the basic issue before this court that we pre-

fer not to summarize it, but rather to set out in full the court's own summary of it, as follows:

> "The question is not one of the validity of the assignments but for the purpose of determining income tax liability it is one involving the date when the income became transferable. This question turns upon whether the assignor *had such an interest in the corpus of the trust as to permit of its transfer* (italics ours) or whether the assignor's interest was separate from the property and limited to the income which accrued from year to year.
>
> The latter seems to be the situation. The testator made an income provision for his son. It was in the trustees' hands beyond the reach of the son's creditors. The son could not create obligations enforceable against it. Upon the son's death the said income ceased. It passed to either his children or to the heirs of the testator or in part to the widow of the son, depending upon survivorship, etc. The income passed to them not by act of the son, but by the testamentary trust provision of the testator. *The son's interest was therefore not in any way attached to the corpus of the estate that produced the income. The income was not even subject to his disposition until he received it.* (Italics ours.) The attempted assignment to his children was in legal effect merely a direction to the trustees to pay to his children out of the income *due to him*, various specified amounts each year. It does not militate against the conclusion that the income was *his*, and was due to him. While he could authorize the trustees to deliver to another what was due to him, it was not deliverable until it was *his to dispose of.*" (R. 121.) (83 F. (2) 662.)

We submit that the rule so contended for is both highly technical and highly impracticable and leads to endless difficulties. And furthermore, it is entirely at discord with that basic conception of income taxes referred to by this court in the case of

Corliss v. *Bowers*, 281 U. S. 376,

where it was said (p. 378):

> "But taxation is not so much concerned with the re-

> finements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. * * * The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

Or as was said in the case of *Freuler* v. *Helvering,* 291 U. S. 35, 49, cited above

> "The law of taxation is more concerned with the substance of economic opportunity than with classifying legal concepts, and tagging them with names and labels. *Burnet* v. *Harmel,* 287 U. S. 103."

See also

Burnet v. *Guggenheim,* 288 U. S. 280, 283.

But the income that was paid subsequent to the date of the assignments by Edward T. Blair was not subject to his command in any way. He retained no power of revoking the assignments in whole or in part, as was done in the case of *Corliss* v. *Bowers,* 281 U. S. 376, above cited. He had completely parted with all interest in it. It was to him of no economic opportunity or benefit.

But even accepting the highly technical test suggested by the Commissioner and sustained by the Circuit Court of Appeals for determination of the question here involved, the proposition itself is in direct conflict with the settled principles of substantive law. For it is not correct to say that the interest of the life beneficiary, is in no way attached to the corpus of the estate that produced the income. It is not correct to say that such a life beneficiary has not a present property interest capable of being assigned. On the contrary it is a principle of substantive law that has been declared repeatedly by this court and courts of Illinois, where the trusts were created, by courts of other states, and by text writers, that the interest of a life beneficiary is an interest in the property of the trust and therefore is attached to the corpus itself; that it is not merely a chose in

action, a right to some future income, but is a present property right belonging to the life beneficiary; that that property right is capable of assignment as such; that when assigned such interest is not a chose in action for some future income; that it is an evidence of the assignees' right, title and estate in and to the property. This court has repeatedly so held.

THE DECISIONS OF THIS COURT ON THE SUBJECT.

The case of *Irwin* v. *Gavit,* 268 U. S. 161, is particularly apt with reference to these principles. In that case the taxpayer was taxed by the Commissioner on income that he had received as a life beneficiary of a trust which was created by the will of his wife's father. If this money received from the trust by Gavit was to be regarded in and of itself as a bequest under the will, then it would be merely a bequest payable in the future, in which case it would be principal and not be taxable to Gavit. If on the other hand the bequest was to be regarded as an interest in the trust estate, and the amounts paid to him to be income from that interest, then those amounts would be taxable to him as income. In this court Gavit contended that the payments received by him were nothing more than installment payments of a bequest, and that the fact that the installments were paid out of the increase from the corpus, leaving the corpus intact, made no difference. (See page 104.)

On the other hand, the Government maintained through the Solicitor General that (see 268 U. S. page 162):

> "What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income. On this interest or use there was no tax because he received it as a bequest. On the other hand, what income Gavit received from the trustees of the estate was taxable. Gavit's interest in the trust fund

> was 'property' the 'value' of which is exempt from tax as income because received as a bequest. * * * The fact that the enjoyment is uncertain never interferes with the vesting of an estate. When the contingency is not in the person, but in the event when enjoyment shall commence, or in the time of the enjoyment, the interest is considered vested."

The Solicitor General goes on to argue that earnings from capital constitute income, while a bequest of capital in bulk, or in installments over the years, is not income and then adds (162):

> "Here not a portion of the capital assets forming the corpus, but certain of the earnings thereof passed to the *cestui que trust.* The *cestui que trust* has an interest in the corpus because he is legally entitled to receive whatever income is given him and must have the right to enforce payment if it is wrongfully withheld. The act of 1913 specifically taxes income 'growing out of the ownership or use of or interest in real or personal property.' Therefore, it must inevitably follow that, as Gavit had an 'interest in' the corpus, the proceeds thereof coming into his hands were taxable income. In denying that the *cestui que trust* had any interest in the principal the lower courts ignored the law of the State of New York as to trust estates."

And we state thus fully the contention of the Government in the *Gavit* case as it is exactly the contention that we are making here, and it is exactly the opposite of the contention that the Government made in the court below and we assume will make here.

In its decision of the case this court held that the bequest was the corpus of the trust estate, and that what had been received by Gavit as a life beneficiary in the proceeds of that bequest was income and taxable to him. Then with reference to the holding of the lower courts that Gavit had received no interest in the corpus, this court said, at page 167:

> "We do not regard those considerations as conclusive, as we have said, but if it were material *a gift of the income of a fund ordinarily is treated by equity as*

creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." (Italics ours.)

And it is to be particularly noted that in the Gavit case the life beneficiary under no circumstances whatsoever was to receive any part of the remainder of the corpus of the trust estate when the trust terminated. That passed to others. (See page 166.)

Here there is a clear recognition by this court of this principle of substantive law that the interest of a life beneficiary is an actual present interest in the corpus of the trust fund.

On the authority of this decision Edward T. Blair was liable for the tax on the income he received from the trustees *prior to the assignments.* By the same reasoning he should not be liable for the taxes on the income which *subsequent to the assignments* he did not receive at all, but the assignees did receive from the trustees. For of course it has never been contended by the Commissioner that both the original life beneficiary and the assignees are liable for the tax. If the assignor is to be held liable then consider the anomaly in view of the reasoning of the Gavit case: In the case of a life beneficiary of a trust, it is the law that he has received something, a property interest, the income from which is to be charged as taxable to him. While if the Commissioner is right, then the person to whom the life beneficiary has assigned that very same interest receives no such interest, the income from which is to be chargeable to him. We submit the two positions are inconsistent and lead to an anomalous and most impractical situation.

We also desire to call particular attention to the case of *Brown* v. *Fletcher,* 235 U. S. 589 wherein this court held that the interest of a life beneficiary in a trust was not merely a chose in action, but an actual present property interest in the corpus of the trust.

Both the facts and the pronouncements of the court are of prime importance in this connection.

In that case Conrad Baker, son of the testator who created the trust, had a life interest in the income and, if he lived to be 55, would take a large portion of the remainder of the corpus. He assigned his interest in part to secure certain notes of his. When they were not paid the interest was foreclosed and acquired by the holders of the notes. These holders were residents of Philadelphia. The trustee and the beneficiary were both residents of New York. The holders of the notes as assignees of the interest brought suit in the United States District Court in New York. They were immediately met with a defense that that court did not have jurisdiction in view of Section 24 of the Judicial Code, which precluded a suit "to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court if no assignment had been made"; and that as the life beneficiary and the trustee were residents of New York the life beneficiary could not have brought suit, and his assignee could not and hence the court had no jurisdiction.

This Court reviews the decisions construing the Act and shows that if the suit were brought upon the assignment and the assignment was a mere chose in action, then the court would not have jurisdiction, but if the suit were to recover an existing present property right that had been assigned, then the Act would not apply and the court would have jurisdiction. (See page 596.)

Therefore, the sole question presented was whether, as the court notes, page 597,

> "these proceedings by Bill in Equity are suits by assignees on a chose in action; or, suits for the recovery of an *interest in property by the transferee or assignee.*" (Italics ours.)

This court then held that the interest of the beneficiary of the trust was not a mere chose in action, but was an interest in and to the property. This court said (page 599):

> "The beneficiary here had an interest in and to the property that was more than a bare right, and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. * * * The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property."

It is true that in the *Brown* case it so happens that the life beneficiary also would take, if he lived long enough, the remainder interest. But that is not a factor in determining what his interest is from the standpoint of the income, as his interest in the remainder might have been defeated completely by his prior death. (See page 590.) And there is no case to be found making any such distinction.

The principle was again reaffirmed in the case of *McGuire* v. *Trefry*, 253 U. S. 12.

Here Massachusetts had levied an income tax on a resident of Massachusetts for income received from the Girard Trust Company of Philadelphia, being interest paid on several corporate bonds held by the trustee in Philadelphia. The trust was administered under the laws of Pennsylvania. The Court holds that the taxpayer had an interest

in the trust estate, realized in the shape of income which could be taxed in Massachusetts, and in part said (pp. 16-17):

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an *equitable right, title and interest distinct from its legal ownership.* 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others.' 2 Story's Equity, 11th ed. sec. 964. *It is this property right belonging to the beneficiary, realized* in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts."

In a most recent case of *Senior* v. *Braden* (1935), 295 U. S. 422, this Court reannounced the same basic principle. There the question involved was as to the nature of certain trust certificates issued by a so-called Massachusetts trust on land in Chicago and other States and held by a resident of Ohio. The question was whether they could be taxed in Ohio. This court held that the trust certificates were interest in the land that constituted the trust fund; that the beneficiary holding them had an interest in the trust fund itself, and that therefore they were not subject to tax in Ohio.

This court in its opinion quoted at length from the case of *Brown* v. *Fletcher,* 235 U. S. 589, above cited, including the parts which we have quoted, and then said (page 433):

> "The doctrine of *Brown* v. *Fletcher* is adequately supported by courts and writers. *Narragansett Mutual Fire Ins. Co.* v. *Burnham,* 51 R. I. 371, 154 Atl. 909; *Bates* v. *Decree of Court,* 131 Me. 176, 160 Atl. 22; Bogert, Handbook of the Law of Trusts, 430; 3 Pomeroy Equity Jurisprudence, Fourth Edition, 1928, Sec. 975, p. 2117; 17 Columbia Law Review, 269, 289. We find no reason for departing from it."

Croxall v. *Shererd,* 5 Wall. 268, 72 U. S. 268.

In this case this court had occasion to consider very fully just what interest a life beneficiary had in a trust estate, and in summing up the situation it was said, at page 281:

> "In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate.
>
> The trust like the legal estate is descendible, devisable, alienable and barrable by the act of the parties, and by matter of record. Generally, whatever is true at law of the legal estate, is true in equity of the trust estate." Citing many English equity cases.

SOME DECISIONS OF ILLINOIS AND OTHER STATES.

Merchants Loan & Trust Company v. *Patterson,* 308 Ill. 519. In that case Patterson joined with three others in transferring to a trustee certain properties that they owned jointly. The income was to be paid out as directed partly in the instrument itself and partly by joint orders later to be given by the grantors. This instrument was dated December 20, 1897, and it was provided that the trust was to terminate May 1, 1917, at which time the interests were to be conveyed back to the grantors. (See page 522.) In the case of the death of any one of them, before that time the share of the income that he would have been entitled to, and the share of the corpus, were to be conveyed at the proper time to such person as might be designated in the will of the decedent. (See page 524.) Some three years prior to the termination date Patterson deeded his interest in the same property to his wife, subject to the trust of 1897. Patterson subsequently died before the termination of the trust, and the question was as to just what his interest in the property had been, and whether it had been conveyed.

The Supreme Court of Illinois held that that interest was an equitable one in the property of the trust and says (pp. 530, 531):

> "It is a fundamental proposition that equitable estates are governed by the same rule as legal estates, *otherwise inextricable confusion would ensue.* (Ibid. sec. 357.) *In the consideration of a court of equity the cestui que trust is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust estate as it would have had at law upon the legal estate. Croxall's Lessee* v. *Shererd,* 5 Wall. 268." (Italics ours.)

In the case of *Nave* v. *Bailey,* 329 Ill. 235, the court in discussing a trust created by deed, said, page 244:

> "It is a fundamental proposition that equitable estates are governed by the same rules as legal estates. (*People* v. *Emery,* 314 Ill. 220; *Merchants' Loan and Trust Co.* v. *Patterson,* 308 id. 519; *McFall* v. *Kirkpatrick,* 236 id. 281.) Any legal conveyance by the *cestui que trust* will have the same operation in equity upon the trust estate as it would have had in law upon the legal estate. (*Merchants' Loan and Trust Co.* v. *Patterson, supra; Croxall's Lessee* v. *Shererd,* 5 Wall. 268; Washburn on Real Prop.—6th ed.—1441.)"

THE TEXT WRITERS ASSERT THE SAME PRINCIPLES.

In view of the basic holding of the Circuit Court of Appeals in this case, as quoted above, that the interest of Edward T. Blair was in no way attached to the corpus of the estate, and that he had not such an interest in the corpus as to permit of its transfer (R. 121), we desire to call this court's attention to the very clear statements to the contrary by text writers on the subject. It is, of course, clear that the interest of Edward T. Blair as a life beneficiary in the trust was an equitable life interest. This is too well settled to need citation of authorities. The following quotations from the text writers are advanced to show it is equally clear that such an equitable interest is in fact

a property interest attached to the corpus of the trust estate, and that the Circuit Court of Appeals' basic contention that it is in no way attached to the corpus of the estate is fundamentally wrong.

This court in the case of *Senior* v. *Braden*, above cited (295 U. S. 422) referred to an article in 17 Columbia Law Review. That article as a commentary by Mr. A. W. Scott of the Harvard Law School on the question involved, as decided by *Brown* v. *Fletcher*, 239 U. S. 589, above cited, and is a comprehensive review of all of the cases and text writers, and the author in his summary says, at page 289:

> "It has been shown that the rights of the *cestui que trust* in respect to their duration, transmission and alienation are treated like property rights rather than like obligations. * * *"

We refer the court to this article as a most complete and scholarly discussion of the proposition involved.

The reference to Pomeroy's text is also most apt.

> 3 Pomeroy's Equity Jurisprudence, 4th Ed., par. 975, page 2117:

There the author says in part:

> "In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership as legal estates are property in contemplation of courts of law. In fact the entire dealing of equity with the subject of equitable estates * * * are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action,—not mere rights to obtain certain equitable remedies. * * * In short, the equitable estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate as a mere form and shadow."

Perry, in the 7th Edition of his work on Trusts, in speaking of the properties of a trust estate says, page 559:

> "And as the trustee may in a court of law, as a general rule, deal with the legal estate in his hands, as if he was the absolute owner, so the *cestui que trust* in a

court of equity may deal with the equitable estate in him; he is the beneficial and substantial owner, and in the absence of any disability, that is, if he is *sui juris*,— he may sell and dispose of it; and any legal conveyance of it will have in equity the same operation upon the equitable estate as a similar conveyance of the legal estate would have at law upon the legal estate."

Bogert in his Work on Trusts and Trustees (1935), Vol. 1, section 183, discusses the particular interest of a *cestui qui trust* and whether it is an interest *in personam* or *in rem*. The author reviews all the authorities and points out that one of the reasons for the *in rem* concept is that

"the *cestui's* power of alienation show him to be an owner of the *res*."

And then after citing as a leading case the decision of *Brown* v. *Fletcher*, 235 U. S. 589, the law is summarized as follows:

"The situation would seem to be summarized by the statement that, while the right of *cestui que trust* was originally purely *in personam* against the trustee, it has become increasingly a right *in rem* and is now substantially equivalent to equitable ownership of the trust *res*. The *cestui que trust*, of course, also has rights *in personam* against the trustee."

In the American Law Institute Restatement of the Law of Trusts, a beneficiary's in interest is defined as follows:

"SEC. 130. The Nature of the Beneficiary's Interest.

Except as stated in section 131,

(a) if the trust property is personal property, the interest of the beneficiary is personal property;

(b) if the trust property is real property, the interest of the beneficiary is real property unless the interest of the beneficiary is so limited in duration that if it were a legal interest it would be personal property."

In the same Work, states with reference to the power of transfer:

"SEC. 132. Powers to Make Voluntary Transfers.

Except as stated in section 133 and sections 149-162,

the beneficiary of a trust has power to transfer his interest."

And again:

"SEC. 133. Capacity to Make or Receive a Transfer.

"The beneficiary of a trust has capacity to transfer his interest to the extent that he has capacity to transfer a similar legal interest, except so far as this principle is restricted by the rules applicable to trusts for the separate use of married women."

And also it is there declared that such an interest can be the subject of a trust, the author saying:

"If the beneficiary of a trust can transfer his interest (see Sec. 132) he can create a trust of his interest, either by transferring it in trust or by declaring himself trustee of it." Sec. 83.

All of which we cite as showing how firmly fixed in the law is the proposition that a life beneficiary's equitable interest in a trust is a present property interest and treated as such for all purposes.

Decisions from Other Circuit Courts of Appeals Holding That Income Paid to Assignees of a Life Beneficiary Is to Be Taxed to the Assignees and Not the Original Beneficiary.

In our petition for certiorari we referred to the following cases as being in conflict with the decisions of the Seventh Circuit in this case. We respectfully submit that they correctly determine this question:

Commissioner v. *Field,* (2nd. Cir.) 42 Fed. (2) 820.

There the court had before it the exact question here involved, namely, whether Marshall Field, III, the life beneficiary of a trust created under the will of his grandfather, should pay the income tax on such income as was paid to his wife pursuant to an assignment by him of a part of the interest to her.

The court found that (p. 821):

> "Marshall executed a deed to his wife *assigning* to her a two-thirds interest *'in all the income of the two-fifths* of the residuary estate of Marshall Field, deceased, * * * intending hereby to convey to and vest in' his wife 'an undivided two-thirds interest in all the net income adjudicated to belong to' him by the Illinois decree." (Italics ours.)

The court held that this assignment transferred a part of the equitable interest of Marshall Field to his wife by the law of Illinois, and that the income from the interest so assigned was not income of Marshall Field and therefore he could not be taxed on it.

The court said in part (page 822):

> "So far as we know, it is universally true that the law considers an *equitable interest for life or for a term of years as present property*, alienable like any other (*Brandon* v. *Robinson*, 18 Ves. 429; *Younghusband* v. *Gisborne*, 1 Collier 400; *Snowden* v. *Dale*, 6 Sim. 524; *Bronson* v. *Thompson*, 77 Conn. 214, 58 A. 692), at least when there is no restraint on alienation (*Nichols* v. *Eaton*, 91 U. S. 716, 23 L. Ed. 254.) The law of Illinois is the same. *Binns* v. *LaForge*, 191 Ill. 598, 61 N. E. 382. In *Irwin* v. *Gavit*, 268 U. S. 161, 45 S. Ct. 475, 69 L. Ed. 897, a series of payments of income was treated as integrated into an existing interest, and for that reason alone the payments were income. No doubt the difference is conventional; there is no inherent reason why other series of future installments should not be regarded as constituting a single right, as is an annuity or the reversion upon a sublease. Some are, some are not; the distinction is historical, not rational. The interest, as adjudicated by the decree, was of a well-known kind, and it was single; in consequence it was presently assignable like a bond or building, and this is equally true though the contingent remainders remained, since Marshall is still alive." (Italics ours.)

Counsel for the Commissioner sought to distinguish this case from the case at bar on the ground that in the Marshall Field case the assignor had a possible interest in the corpus

of the estate, provided he lived to be 50 years of age. But this, we submit, is a distinction without a difference in principle. No cases have been cited by counsel for the Commissioner in support of this distinction, and we have been able to find none. On the contrary, the general principle has been applied in a number of cases where the assignor, the life beneficiary, was only such and would never under any circumstances receive the principal absolutely.

This principle was reasserted by the same Circuit in *Lowery* v. *Helvering,* (Second Circuit) 70 Fed. (2) 713. By will a decedent left to his wife during the term of her life the possession, management and control and the rents and income of his property. At her death the remainder was to go to trustees in trust for his children. The wife assigned to her children the income to which she was entitled, but not the possession, management and control. The Commissioner, the Board of Tax Appeals affirming, taxed the income to the wife, the assignor. The Circuit Court of Appeals, applying the Field case, held that the assignment was a valid assignment of a property interest and the income was not taxable to the assignor. It is to be noted that the assignor had no interest in the corpus other than as trustee, and that the assignment did not convey that interest.

With reference to the character of the interest of the assignor Mr. Justice Hand states in his opinion (p. 714):

> "In England for over a century the bare gift of the income of property has ordinarily passed the 'general property' to the donee; not only is it not necessary to transfer the corpus, but, in the absence of limitation, the gift is not limited to the donee's life."

The court further points out that the gift merely accelerated the enjoyment of the assignees of the income just as it does here. (See page 715 of the opinion.)

Shanley v. *Bowers,* 81 Fed. (2) 13 (Second Circuit). Here

there was a trust created by will for the benefit of the testator's son. He was to receive a portion of the income and upon the death or remarriage of his mother one-half of the corpus. He assigned his entire interest in trust, stipulating that a portion of the income was to be paid to his wife, and that the balance of the income and eventually all of the principal was to be paid to his creditors. The court holds that the income so assigned was not to be taxed to the assignor, as it was a valid assignment of a property interest.

The court says (p. 15):

> "The settlor's (assignor's) interest in the trust set up by the will of his father was certainly a transferable property interest, and the income collected by the transferee was in no degree dependent upon continued activities of the transferor. This Court has already intimated that only in the latter event is an assignment of income to accrue in the future ineffective to make the income the assignee's."

Cases of This Court Cited by Counsel for the Commissioner in the Court Below.

Lucas v. *Earl,* 281 U. S. 111.

In that case the taxpayer had agreed with his wife by a written contract that all salary and attorneys' fees that *he might earn in the future* should be held by them as joint tenants with the right of survivorship. This court found that the Revenue Act specifically provides that personal earnings are income and held that the tax cannot be avoided by an anticipatory arrangement for their disposition. This court said in part (p. 114):

> "There is no doubt that the statute could tax salaries to those who earned them, and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."

Clearly the reason for that decision is that personal earn-

ings are specifically taxed under the statute as income to the man who earned the income even though there might be an attempt to transfer them in advance.

Burnet v. *Leininger,* 285 U. S. 136.

Here, too, there was a partnership of which the assignor, one of the partners, assigned a portion of his interest in the partnership to his wife. The question was whether the income from the portion assigned should be taxed to him. The court in holding that it should be, says at page 140:

> "The mere communication of the fact that the agreement had been made was not enough. It does not appear that there was any attempt to change the ownership of the partnership assets or the control of the partnership enterprise. It was the husband's interest that was the subject of the agreement. His wife was to be an equal 'partner with him' in that interest. The business of the firm was continued as before. * * * If it be assumed that Mrs. Leininger became the beneficial owner of one-half of the income which her husband received from the firm enterprise, it is still true that he, and not she, was the member of the firm and that she had only a derivative interest."

In short the distinct holding of the court is that there was no assignment of the property interest as the other partners had something to say about that and they had not agreed.

This distinction clearly appears when we consider the case of *Poe* v. *Seaborn,* 282 U. S. 101, where there was presented to this court the question whether an individual living in the State of Washington and subject to a community property law, whereby one-half of his personal earnings belonged to his wife, should be taxed with the whole earnings or only the half which came to him. And this court held that he should be taxed with but the half, the other half being the property of his wife. Here the Community Property law effected a valid assignment of one-half of the interest, and the tax burden was held to pass with the in-

terest validly assigned. While in the other two cases the assignments were not valid or effectual so that the tax burden did not pass.

But the case at bar does not touch either of these situations. There is no question of personal earnings involved and the assignments did not need the agreement or action of any third person.

The cases of *Helvering* v. *Schweitzer,* 296 U. S. 551, *Helvering* v. *Stokes,* 296 U. S. 551, and *Douglas* v. *Willcuts,* 296 U. S. 1, may be referred to.

In the Willcuts case there was actual property assigned in order to take care of the obligation of the assignor to pay alimony. It was this fact that furnished the basic reason for the determination that the income was paid in discharge of the assignor's obligation, and therefore should be taxed to him. The same principle was applied in the Stokes and Schweitzer cases, where the assignments were for the purpose of taking care of the obligations of the assignors to support their minor children, respectively. (See also 79 Fed. (2) 256, 258, and 75 Fed. (2) 702.) There was no such obligation or undertaking in the case at bar, and hence these cases are not in point.

Cases of the Various Circuit Courts of Appeals Holding to the Same Effect with Reference to Assignments Generally.

Nelson v. *Ferguson,* 56 Fed. (2) 121 (3rd Cir.).

In this case the taxpayer, Nelson, owned certain patents which he desired to have exploited. He entered into a contract with a corporation whereby he assigned the patent to it, and it agreed to exploit the invention and pay one-third of the net profits to Nelson. Then Nelson transferred his entire interest in the profits from the contract to his wife. The question was whether the profits paid to his

wife under the assignments should be taxable to Nelson. The court held they should not be, after a thorough review of all the decisions, including the case of *Lucas* v. *Earl,* 281 U. S. 111, above referred to.

The court distinguished that case upon the fact that the assignment by Nelson was not of future salary or personal earnings but that the contract constituted a property right, and that the assignment of that property right was an assignment of a present interest in future earnings, and therefore not within the Earl case.

The court said in part (p. 124):

> "In answering these questions it must be kept in mind that the thing assigned was not Nelson's future salary or personal earnings as in the Earl case and in the later case of *Luce* v. *Burnet, Commissioner,* 55 F. (2d) 751, Court of Appeals of the District of Columbia, January 18, 1932, *things not then in existence,* 5 Corpus Juris 87, *but was an existing thing, namely, property in a contract.*
>
> The assignment being of property was therefore not merely an assignment of income when earned, though from the property assigned profits and income were expected to flow. * * *
>
> Though the future income from this property right was uncertain and contingent as to amount, the right itself, the thing assigned, was fixed and certain—not revocable as in *Corliss* v. *Bowers,* 281 U. S. 376—and was independent of any future service or any future action on the part of the assignor."

In the case of *Hall* v. *Burnet,* 54 Fed. (2) 443, the Circuit Court of Appeals for the District of Columbia had occasion to consider an assignment made by a taxpayer to his wife of an undivided interest to the extent of $33,333 in his contract with an insurance company for commissions on renewals of risks placed by him as an agent. The court held the assignment a valid conveyance of a property right carrying with it the earnings and making those earnings

the income of the transferee and not of the taxpayer. The court said the assignment was not

> "of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction." (Page 444.)

The court then pointed out that the contract with the insurance company gave the taxpayer a property right in the renewal premiums which was independent of any future services he might have to render, and continuing says:

> "Any uncertainty in the situation concerned *only the amount;* but the agent's rights as against the insurance company were established. When, therefore, the contract was assigned to his wife, a property right passed to her, as capable of assignment as any other sort of property. * * *" (Italics ours.)

Certiorari was denied in this case by the Supreme Court, 285 U. S. 552.

Helvering v. *Seatree* (Ct. of A. D. C.), 72 Fed. (2) 67.

A partnership was terminated by one of the partners resigning. It was agreed that his interest should be paid for by a portion of the earnings of the new partnership formed by the remaining former partners. He assigned a portion of that interest to his wife. Distributions to her in accordance with the assignment were held not taxable to him, as it was an assignment of a property right.

See also:

Rose v. *Commissioner* (6th Circuit), 65 Fed. (2) 616.

Tracy v. *Commissioner* (6th Cir.), 70 Fed. (2) 93.

Saenger v. *Commissioner* (5th Cir.), 69 Fed. (2) 631.

Swartz v. *Commissioner* (5th Cir.), 69 Fed. (2) 633.

From a consideration of these principles, so firmly supported by authority, it seems clear that the assertion that Edward T. Blair did not have a present property right in the corpus of this trust estate capable of present assignment, is in direct conflict with settled principles of substantive law.

On the contrary he had a present property interest, a life interest in the corpus of the fund entitling him to the entire income therefrom.

Edward T. Blair could have sold the interest at any time. The sale would have been held valid, and if made while income tax laws were in effect he would have been assessed with a tax on the income from the proceeds of the sale. Yet, if the Commissioner is right in his contention in this case, then Edward T. Blair would continue liable also for an income tax from year to year as long as he lived, on the income from the very interest that he had sold. This in itself should refute the contention.

Of course there is no difference between a transfer by sale and the transfer by the assignments here in question. Those assignments to his children of the proportion of the interest involved in each, were not merely directions to the trustees to pay to the children specified amounts in each year. They were definite and precise assignments of interests in the equitable life estate of their father in the corpus of the trust estate. The assignments when made were effective to pass the equitable title to all future income of the trust which should be earned during the life of the assignor. Through those assignments Edward T. Blair did no more nor less than give to his children exactly what he had received from his father. The transfer included the obligations and burdens as well as the benefits.

The income which each child received in accordance with the terms of the assignments was income to that child and taxable to the child just as the income to Gavit from an equitable estate for his life was held taxable to Gavit, in *Irwin* v. *Gavit,* 268 U. S. 161.

And on the contrary that income should not be held taxable to Edward T. Blair who thereafter did not own the interest, or the use of it. The interest was not his and the income was not his. He had irrevocably parted with it. To paraphrase the holding of this court in the case of *Corliss* v. *Bowers,* 281 U. S. 376, above cited, he then had no actual command over the property taxed; he then had no actual benefit from which the tax is paid; the income was not subject to his command; he was not free to enjoy it at his option. He had irrevocably parted with it. He should not be taxed on what is not his.

Respectfully submitted,

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APPENDIX A.

Federal Tax Statutes.

Internal Revenue Act of 1924, 43 Stats. 253, Chap. 234 Mason's U. S. Code 1926, Vol. 2, p. 1875:

"Sec. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1921, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 6 per centum of the amount of the net income in excess of the credits provided in section 216," (Here follows the rate for the normal tax, etc.)

"Sec. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1921, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected and paid for each taxable year upon the net income of every individual a surtax as follows:" (Here follows the surtax rates.)

"Sec. 212. (a) In the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206."

"Sec. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever. * * *

(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title: * * *

(3) The value of the property acquired by gift, be-

quest, devise, or descent (but the income from such property shall be included in gross income);"

The 1926 Act, Chap. 27, 44 Stats. 126, is practically the same, having the same paragraph numbers.

The Revenue Act of 1928, Chap. 852, 45 Stats. 795, is also practically the same in its provision, the sections being numbered 11, 12 and 22 respectively.